

**January 5, 1996**

**P.S. Protest No. 95-48**

**ENERGY OPTIONS INC.**

**Solicitation No. 33560-94-A-0244**

**DIGEST**

Protest against award of shared energy savings contract is dismissed and denied. Objections to lack of specificity in evaluation scheme for alternative proposals for replacement and retrofitting of lamps and to basing evaluation of financial proposals on net present value are untimely raised; technical evaluation of successful offeror was neither arbitrary nor capricious.

**DECISION**

Energy Options Inc. protests the award of a contract under solicitation 33560-94-A-0244 to Conogen, Inc.

Solicitation -0244 was issued June 12, 1995, by the Purchasing and Materials Service Center, Hoboken, NJ, seeking offers for a lighting replacement project at the New Jersey International Bulk Mail Center (BMC) on a "shared energy savings" basis.<sup>1</sup>

The statement of work required the contractor to perform an "energy lighting survey" at the BMC, identifying "energy conserving opportunities" (ECOs) with respect to the lighting systems, and to prepare a report to identify each ECO and its costs, savings, and payback. The contractor was also to prepare an implementation plan for the work necessary to accomplish each ECO. As originally issued, Section 1.0 of the statement of work provided,

<sup>1</sup> A second solicitation issued the same day sought offers for the replacement of the air conditioning chillers at the BMC on a similar basis. The two solicitations were the subject of a common preproposal conference, the transcript of which was incorporated into the lighting solicitation by amendment A02. The protest concerns only the lighting solicitation.

in part, that "[a]ll fixtures or lighting systems will be replaced except as otherwise indicated by the facility's Maintenance Manager. All replacements will be with new fixtures."

Amendment A02 added a new section 1.1 to the statement of work as follows:

Lighting fixtures identified as and recommended as having energy conservation opportunities are to be considered for replacement with new fixtures. Retrofitting of existing fixtures is acceptable. Retrofits must include as a minimum new lamps, new ballasts, new lens/difusers [sic], new tombstones, new electrical wiring for ballasts. Details of the proposed retrofit methodology must be fully explained.<sup>[2]</sup>

A section of the solicitation entitled "Award Criteria" provided as follows:

Award will be made to that offeror whose proposal contains the combination of those criteria offering the best overall value to the Postal Service. This will be determined by comparing differences in the value of technical and management features with differences in the net present value to the Postal Service. In making this comparison, the Postal Service is concerned with striking the most advantageous balance between technical and management features and the net present value to the Postal Service with technical features carrying a higher percentage of the overall evaluation weight.

The price evaluation of the offeror's proposal will be based upon the total net present value of the energy dollar savings to the Postal Service. This value will be calculated using Attachment A . . . .

The technical evaluation of the proposed energy conservation opportunities (ECOs) will consist of the following factors, listed in descending order of importance:

<sup>2</sup> That fixtures could be retrofitted instead of replaced was a change from the discussion at the pre-proposal conference, at which the postal participants indicated that all new fixtures were required even though representatives of various offerors had contended that offers proposing fixture replacements could not be cost effective. Amendment A02 contained a further clarification in this regard:

New fixtures are to be used whenever the lighting system is replaced with another source. . . . If the lighting source remains the same and only the wattage is changing then the fixture may be retrofitted.

Factor 1 - Energy Survey Report Reference Technical Specification Section 1, Part 4.	65%
Factor 2 - Maintenance and Operations Reference Technical Specification Section 1, Part 4.5 f.	20%
Factor 3 - Facility Energy Usage and Baseline Reference Technical Specification Section 1, Part[s] 2 and 4.3	10%
Factor 4 - Implementation Plan Reference Technical Specification Section 1, Part 4.6	5%

Attachment A to the solicitation, on which the offerors' financial proposals were to be submitted, and its instructions were revised by Amendment A02. As revised, the instructions for the completion of the form included the following:

Attachment A [will be] completed for a contract (payment) period of five years. This form will show the offeror's proposed percent of annual savings and proposed percent of annual savings for the Postal Service for each [year] of the five-year contract. . . .<sup>[3]</sup>

Amendment A02 provided, however, that "[an o]fferor's financial proposal may include additional alternatives [for maximum contract length]. Contract length may be determined on the basis of the financial proposal." The net present value of each offeror's proposal was to be calculated on Attachment A-1 to the solicitation by applying a discount factor to the Postal Service's share of each year's savings.

Four offerors submitted proposals for the chiller solicitation, and five offerors submitted proposals for the lighting solicitation. Three of the offerors, including Energy Options and Conogen, proposed on both solicitations. Conogen's chiller proposal was the only one found to be technically acceptable and its and Energy Option's lighting proposals were the only ones found to be technically acceptable. Energy Options' lighting proposal called for provision of new electrical fixtures; Conogen's proposal called for retrofitting existing fixtures. Energy Options had a technical score of 90.2 points; Conogen had a technical score of 75.6.

<sup>3</sup> The lighting solicitation contained a provision entitled "Rebates" which was revised at the preproposal conference to read as follows:

Rebates given by the local utility companies will accrue to the Postal Service and are not part of the energy savings for which project economic computations are made. The rebates may be used as part of the financial evaluation for each energy conservation project. Rebates will not be used by the offeror to finance their [sic] project costs, although the Postal Service may use the rebates to make a lump sum "Buy Down" payment of the project costs. Any rebate obtainable due to the offer of [sic] technical proposal must be fully described and quantified in the financial proposal submitted to [the] relevant project with appropriate certification by the utility company.

Energy Options had proposed a ten-year contract term. As evaluated, the offer had a negative net present value, exclusive of rebates, of -\$1,042,076. Including rebates, its net present value was \$2,505,855. Conogen's lighting proposal contemplated a five year term, for which its net present value, exclusive of rebates, was \$135,125. Extrapolated to a ten-year term, for comparison with Energy Options' proposal, its net present value, exclusive of rebates, was said to be \$1,042,076, and its net present value, inclusive of rebates, was said to be \$4,786,049. The net present value of its chiller and lighting proposals together, over a fifteen-year term, was said to be -\$2,023,390 exclusive of rebates, and \$2,087,392 including rebates.

The chairman of the financial evaluators recommended that award be made to Conogen, noting that Conogen offered a higher net present value than Energy Options both with and without rebates. A brief joint memorandum from the chairmen of both the technical and financial evaluators similarly recommended award to Conogen "based upon a combination of technical and economic factors [in which] Conogen's proposal represents the best overall value to the Postal Service."

The contracting officer states that she "concluded that even though Energy Options had a better [technical] score on their lighting proposal it was not worth the lower financial value that would be incurred by the Postal Service." On September 22, Conogen was provided with a notice of intent to award upon the receipt of the appropriate payment and performance bonds. The bonds were received on September 29. The unsuccessful offerors were advised of the anticipated award by letters dated September 29, and the contract award and notice to proceed were issued on October 5.

The contracting officer received Energy Options' protest on October 16. After complaining about its failure to receive a timely debriefing, the protester raises numerous technical questions about the adequacy of Conogen's proposal with respect to the requirements of the solicitation. The protester also questions the evaluation of the financial proposals, contending, *inter alia*, that "since you are buying two distinctly separate proposals," net present value is "not an adequate measure of a delivered package." Finally, the protester complains that certain information included in the solicitation about the existing conditions at the BMC contained information and was in a format taken from a proprietary unsolicited proposal which Energy Options had previously furnished to the Postal Service.

The contracting officer's statement responds to the issues raised in the protest. Initially, the contracting officer notes that to the extent that the protest complains that replacement and retrofit offers cannot be compared to each other, it is raising an issue apparent when amendment A02 was issued, and is now untimely presented after the time set for the receipt of proposals.<sup>4</sup> Responding to the technical issues presented in the protest, the

<sup>4</sup> The contracting officer cites Procurement Manual (PM) 4.5.4 b. for this proposition. What was section 4.5.4 b. in previous editions of the Procurement Manual was redesignated as section 4.6.4 b. in the current edition, TL-8, July 12, 1995. It provides as follows:

Protests based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals.

contracting officer concludes in some cases that the protester's contentions that the solicitation required (or precluded) specific technical approaches are incorrect, and in other cases that the technical evaluators considered the concerns addressed by the protest and found Conogen's proposal compliant.

With respect to the financial issues of the protest, the contracting officer notes that the solicitation clearly set forth the calculations by which an offer's net present value was to be determined. While Energy Option's proposal contemplated greater energy cost savings than Conogen's proposal, the former proposal contemplated that the contractor would retain a greater portion of the savings than did the latter. Because Conogen's proposal resulted in a positive net present value, it was viewed as "far superior" to Energy Option's proposal. In a footnote, the contracting officer asserts that the protester's concerns about the dissemination of its proprietary material in the solicitation is either irrelevant to the protest or untimely raised.<sup>5</sup>

The protester filed comments taking exception to the contracting officer's statement. According to the protester, its protest was not untimely because instead of challenging the solicitation terms, it is protesting the scoring of the retrofit proposal by the technical evaluators. In the protester's words:

There is no question that a retrofit solution is cheaper on a first cost basis, however how does one evaluate a true long term effect, without adequate information[?] They are not [of] the same technical merit, nor operationally are they the same. Very simply, the correct scoring methodology was not offered to the Technical Evaluation team, and this could only occur after the RFP's were submitted. . . .

Energy Options objects to the contracting officer's analysis of its previously raised issues, contending that the contracting officer is in error as to each element of her defense. Raising a new matter, the protester asserts that Conogen has failed to timely submit its proposal to the electric company serving the BMC, thereby losing entitlement to an energy rebate to the Postal Service.

The contracting officer commented on the protester's further submission, restating points previously made, and asserting (with Conogen's concurrence) that no utility rebate has been lost. Conogen also submitted comments which contend that its proposed approach is fully consistent with the solicitation.

## **DISCUSSION**

<sup>5</sup> Noting that Attachment A contained a statement that "[m]inimum contract length is three years; [m]aximum contract length is seven years," the contracting officer also speculates that Energy Options' ten-year offer "could be determined non-responsive [sic]." In fact, the quoted statement appeared only on the version of Attachment A distributed with the initial solicitation; no such statement was included on the revised Attachment A which accompanied Amendment A02. The revised Attachment A clearly contemplated the possibility of a ten-year contract, since it listed net present value discount factors for as many as ten years.

The summary of the protest against the technical evaluation of Conogen's offer set out above omits the substance of Engergy Option's objections because we need not respond to them with specificity. As the contracting officer has suggested, to the extent that the protest contends that the solicitation evaluation scheme is insufficient to allow the intelligent comparison of replacement and retrofit offers, it is now untimely raised. While we have some sympathy for the protester's contention that the solicitation was not well designed for the comparison of competing offers of different types, its failings in that respect should have been apparent upon the issuance of Amendment A02. Not having raised the issues then, the protester may not have them considered now. *Doninger Metal Products Corporation*, P.S. Protest No. 90-50, October 10, 1990.

Similarly, the protester bases its objection to the financial evaluation on a claim that it is inappropriate to establish the values of the competing approaches by calculating life-cycle savings and reducing them to a net present value. But that is precisely the evaluation scheme set out in the solicitation as confirmed by the hypothetical example set out as Attachment C in Amendment A02. Accordingly, that issue is now untimely raised. The protester's objections to the manner in which the solicitation provided information about the current status of the facility are also untimely.

To the extent that the protest takes exception to the evaluation of specific elements of Conogen's proposal, it fails to meet its burden of proof. We restate our well-settled standard for the review of proposal evaluation:

It is not the function of our office to evaluate technical proposals or resolve disputes on the scoring of technical proposals. In reviewing a technical evaluation, we will not evaluate the proposal *de novo*, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. We will not overturn the determinations of a contracting officer unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. Similarly, we will not substitute our views for the considered judgment of technical personnel upon which such a determination is premised in the absence of fraud, prejudice, or arbitrary and capricious action.

The protester bears the burden of proving its case affirmatively. This burden must take into account the "presumption of correctness" which accompanies the statements of the contracting officer, and if such allegations do not overcome the presumption of correctness, we will not overturn the contracting officer's position.

*Timeplex Federal Systems, Inc., Sprint Communications Company*, P.S. Protest Nos. 93-22; 93-24, February 2, 1994 (citations omitted). We are unable to conclude that the evaluation of the offer was arbitrary or capricious under that standard.

The protest is denied in part and dismissed in part.

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Contract Protests and Policies